

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

50993

FILE: B-182288

DATE: August 20, 1975

MATTER OF: Modular Devices, Inc.

97473

DIGEST:

1. Where record indicates a critical supply shortage of urgently required components for inclusion on military aircraft, there is no legal objection to sole-source urgency purchase from only manufacturer that could qualify for waiver of first article testing so as to meet the required delivery schedule.
2. Where agency's first article testing requirements permitted waiver therefrom for "qualified" firms, defined as firms having previously passed first article testing and as having manufactured the article during the prior 12 months, such "qualification" requirement is not undue restriction on competition where record shows that there has been continuing problem with item meeting specification requirements.
3. Record provides no basis upon which to conclude that urgency procurement was not warranted, where item was "in a stock out position," there was a back order of 191 items, and there was a projected requirement of 1,174 units before commencement of deliveries under only existing contract.

Modular Devices, Inc. (Modular), has protested an oral sole-source solicitation (74-R-4624) and ensuing award on September 10, 1974, by the Air Force to Andrea Radio Corporation for 867 Airborne Inter-Communication Amplifiers (AIC), Type AM4346. The agency advises that the award constituted an interim buy on an urgency basis from the only source that was able to qualify for waiver of first article testing, a process which reportedly would otherwise delay delivery of the needed items for an unacceptable length of time. This interim purchase was consummated during the life of contract F09603-74-D-4343, awarded to Bruno-New York Industries Corporation (Bruno) on February 15, 1974, as the low offeror under a competitive procurement for 842 each of the items, in which Modular was the fourth low evaluated offeror. That contract, containing a first article testing requirement, set forth a delivery schedule calling for shipment of production units to commence in July 1975, with first articles due December 15, 1974.

Modular protests that as the successor to Melcor Electronics Corporation (Melcor), which underwent verification tests on the subject item in 1972, it was fully qualified to bid. In this connection, Modular points out that its key personnel were formally with Melcor, which had successfully produced thousands of the items under prior defense contracts. Modular also protests that the contracting agency, the Air Force's Warner Robins Air Logistics Center, failed to take timely and adequate action to initiate qualification procedures for its proposed item, that it failed to communicate with Modular for more than 3 months following its data submission, and that had the matter been handled in a proper manner, the Government could have been the recipient of a second qualified source.

In this regard, the record indicates that Modular was advised in May 1974 that in order to be a "qualified source" it must have had produced these items within the past 12 months. The contracting agency requested that Modular provide data that would prove that Melcor had "qualified" under ASNAC 70-1 so that some of the first article testing necessary for qualification might be waived. The record shows that such data was furnished on June 6, 1974, for evaluation but that review thereof indicated Modular was not a "qualified source" for the item for the reason that the Melcor items were manufactured to a military specification which has since been replaced by ASA specification ASNAC 70-1 and Amendment 01. It is stated that a letter of September 18, 1972, stating that verification tests conducted on Melcor's models showed acceptable compliance with the performance requirements of ENVAC-70-1, covers the AM 1965/AIC which is no longer being procured, and the contracting agency is now purchasing the AM 4346/AIC instead. It is stated that the specifications currently applicable to this item provide for additional and more stringent requirements which would require requalification of any item qualified under the superseded specification.

The record shows that by letter of October 1, 1974, Modular was advised that its proposed test procedures for the AM 4346 Amplifier were acceptable. The agency concedes that the 4-month delay in approving the test plan was excessive. However, it is stated that these were only proposed test plans, not testing results, and that first article must have been manufactured, tested, and the results evaluated before Modular could become a "qualified source." This process would reportedly consume approximately 210 days.

Although the contracting agency admits that the time consumed in evaluating Modular's test plan was excessive, in view of the fact that Modular was determined unable to qualify for waiver of first article testing for this interim purchase, and that such qualification would consume approximately 210 days, we are of the opinion that Modular was not prejudiced since it could not have qualified in time to meet the agency's emergency requirements. Our Office has recognized that time of delivery can assume controlling importance in urgent procurement situations, and we have not objected to a sole-source award to the only offeror qualifying for waiver of first article testing when such waiver is essential to the fulfillment of required delivery schedules. 49 Comp. Gen. 639 (1970); also Stewart Warner Corporation, B-182536, February 26, 1975. Since the record clearly establishes the unavailability of any source other than Andrea that could qualify for such waiver in order to meet the agency's emergency supply requirements, we cannot object to the award to Andrea under the circumstances.

The protester further objects to the contracting agency's procurement policy regarding AIC "Equipment" qualification as set forth in an agency letter to the protester. That letter explained, in pertinent part, that any contractor which had not "qualified" under the specification listed in the solicitation must become "qualified" by obtaining first article approval from the Air Force. Further, in order to be considered a "qualified" source, the letter stated that contractors must have produced the specific item within the past 12 months, otherwise the item must be requalified. The protester alleges that the foregoing rule has the effect of restricting competition to a narrow group of possible offerors and does not serve the Government's best interests since it has not been shown that it insures a more reliable product.

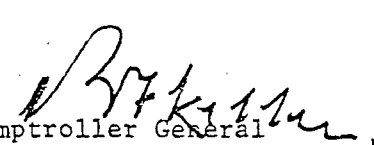
As for the validity of agency requirements for first article testing, and the conditions under which the requirements may be waived, our Office has consistently held that contracting agencies are vested with the responsibility of determining the amount of testing necessary to assure specification compliance. The Air Force states that the first article testing and 12-month requirement for this item and other electronic devices has been in effect for several years and is necessary because the AIC series of intercommunications equipment has had continuing problems. Since our Office is not equipped to consider the technical sufficiency of such determinations, and since such determinations are matters primarily of administrative discretion, we will not substitute our opinion for that of the technical activity assigned the duty to oversee the acceptability of articles. See 52 Comp. Gen. 778 (1973) and cases cited therein.

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The protester also alleges that the contracting agency had not provided facts to support its position that its inventory stock was in sufficiently short supply so as to justify the urgency procurement, and further that the number of items procured were in excess of an amount which could be justified under urgency conditions.

The history of the sole-source award to Andrea reveals that on April 5, 1974, the item was declared "in a stock out position" and was required to support C5A/C141 aircraft. On April 8, 1974, the determination was made that it would be impractical to proceed by formal advertising. It was explained that inventory conditions were such that a 3-month demand rate of 130 per month far transcended the 253 amplifiers on hand on May 23, 1974, with 123 to be shipped shortly thereafter. On August 30, 1974, the requirement was upgraded to emergency status. As of September 10, 1974, the date of award to Andrea, it is reported that there was a 191 item back order of various priorities, and a projected rate of 1,174 units of unfulfilled requirements by July 1975 when Bruno's deliveries were due to commence. It is reported that Andrea's contract deliveries were in fact completed on September 30, 1974. This data has been reviewed carefully by our Office and, on the basis thereof, we have no basis for concluding that the emergency procurement in quantity specified was not warranted.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States